Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-636

IN THE

Supreme Court of the United States

October Term, 1985

JANICE MARIE NYFLOT,

Appellant,

vs.

MINNESOTA COMMISSIONER OF PUBLIC SAFETY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

16 pp

QUESTION PRESENTED

Does a person lawfully arrested for driving while under the influence of alcohol have a federal constitutional right to consult with counsel prior to deciding whether to submit to mandatory testing to determine alcohol concentration?

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The Appellee moves the Court to dismiss the appeal herein pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the ground that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

A. The Statute.

This appeal raises the question of the validity of certain provisions of the Minnesota Implied Consent statute, Minn. Stat. § 169.123 (1984).

This statute provides that persons suspected of driving while under the influence ("DWI") may be required to submit to tests of blood, breath or urine to determine their "alcohol concentration."[1] In requiring the person to submit to the mandatory test, the officer is required by Minn. Stat. § 169.123, subd. 2(b) (1984), quoted at page 7 of Appellant's Jurisdictional Statement, to advise the suspect, *inter alia*, that Minnesota law requires submission to the test and that the suspect has the right to consult an attorney and arrange for independent testing after the test.

B. The Proceedings Below.

The facts, as set forth in the decision of the court below, are as follows:

On September 23, 1984, Appellant was lawfully arrested for a DWI violation by sheriff's deputies and taken to the law enforcement center in Albert Lea. There she was read the Implied Consent Advisory form and advised as prescribed by the statute. Specifically, she was told (a) that Minnesota law required her to take a test to determine if she was under the influence of alcohol or a controlled substance; (b) that if she refused, her driving privileges would be revoked for a mini-

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[1] "Alcohol concentration" is a new term increasingly replacing the older and more familiar concept of "blood alcohol content" as the objective of testing. The term has separate and distinct definitions for each substance tested. In Minnesota, the definitions are found in Minn. Stat. § 169.01, subd. 61 (1984).

mum of one year; (c) that if she took a test and the results indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal penalties and her driving privileges could be revoked for a minimum of 90 days; (d) that "after submitting to testing" she had the right to consult with an attorney and to have additional tests made by a person of her own choosing; and (e) that if she refused to submit to testing, the refusal would be offered in evidence against her at trial.

Appellant insisted that she be permitted to call her attorney before deciding, but the deputies explained to her that the law had changed and that she did not have the right to do so. She agreed to submit to the breath test, and a deputy began to set up the Breathalyzer instrument. When the instrument was ready, Appellant stated that she would not take the test without first talking to her attorney. One deputy advised her that this was a refusal, and the other began to take down the instrument to put it away.

Appellant was then allowed to call her attorney. After talking with her attorney, she said that she would take the test. A deputy sheriff informed her that she had already refused, and that she could not change her mind.

At trial, Appellant's counsel contended (a) that she had a limited statutory right to counsel under Minn. Stat. § 481.10 (1984), as interpreted in *Prideaux v. State, Department of Public Safety*, 310 Minn. 405, 247 N.W.2d 385 (1976), (b) that the 1984 amendment to the Implied Consent statute did not eliminate that right, and (c) that she had a federal constitutional right to counsel under the Sixth Amendment. The trial court rejected these claims and sustained the revocation.

On appeal to the Minnesota Court of Appeals, Appellant argued that the 1984 statutory amendments did not effectively

eliminate the limited statutory right to counsel recognized in *Prideaux*, and that if it did, the statute violated the Sixth Amendment to the United States Constitution, as well as the Due Process and Equal Protection clauses. The Court of Appeals concluded that although the legislature had apparently intended to eliminate the limited statutory right to pretest consultation with counsel, the amendment was not sufficient to achieve that goal, and that any attempt by the legislature to take away the limited statutory right to counsel would probably violate a person's Sixth Amendment rights.

The Minnesota Supreme Court reversed the decision of the Court of Appeals, holding that persons required to submit to testing under Minn. Stat. § 169.123 (1984) have no right, statutory or constitutional, to consult with counsel prior to submitting to the mandatory test. The decision is reported as *Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512 (Minn. 1985). Appellant appeals that decision.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

This Court previously has been asked to decide the precise question presented in this appeal, and declined review. *See Finocchairo v. Kelly*, 11 N.Y.2d 58, 226 N.Y.S.2d 403, 181 N.E.2d 427, *cert. denied*, 370 U.S. 912 (1962). While the Court has not, in the intervening years, directly addressed the specific issue presented by this appeal, several decisions of the Court inexorably point to the result reached by the Minnesota Supreme Court and the conclusion that no substantial federal question is presented for review. Simply stated, there is no constitutionally-mandated right to counsel prior to mandatory testing for a driver's alcohol concentration.

The fundamental premise of Appellant's right to counsel claim is that the decision whether to submit to testing is a "critical stage" in a DWI prosecution. As stated in *United States v. Wade*, 388 U.S. 218 (1967), a critical stage is the stage at which the assistance of counsel is necessary to protect the person's right to a fair trial. Appellant, and the decisions upon which she relies, misapply that test by construing as a "critical stage" every point at which an important decision with potentially far-reaching consequences must be made. However, in *Wade* the Court prescribed a significantly different analysis. The Court explained that the proper approach is:

> to determine whether the presence of [accused's] counsel is necessary to preserve the defendant's basic right to a fair trial *as affected by his right to meaningfully cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.* [The "critical stage" principle] calls upon us to analyze

> whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and *the ability of counsel to help avoid that prejudice.*

Id. at 227 (emphasis added). Thus, the Court's critical stage analysis focusses not merely on potential consequences, as suggested by Appellant, but on potential prejudice to defendant's right to effective counsel at trial and the necessity for counsel's presence to avoid that prejudice. Application of this analysis to the circumstances of mandatory testing for alcohol concentration can lead only to the conclusion that it is not a critical stage.

The starting point is recognition of the fact that the State is allowed "to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (footnote omitted); *see Schmerber v. California*, 384 U.S. 757 (1966). Because the testing can constitutionally be made compulsory, as it has been in Minnesota, there is no need for consultation with a lawyer for advice on whether or not to consent to testing. Indeed, in *Schmerber* the defendant had consulted an attorney, had refused a blood test based on the attorney's advice, but was tested nevertheless. The Court held that the failure to honor the refusal did not violate the Sixth Amendment right to counsel even though the refusal was based on the attorney's advice. 384 U.S. at 765-66. Furthermore, Appellant as much as concedes that a right to consult with counsel at this stage would not serve the purposes required in critical stage analysis by his argument that no lawyer could ethically advise refusal. *See* Juris. St. at 18.

The invalidity of Appellant's critical stage argument is emphasized by this Court's express statement that "preparatory step[s] in the gathering of the prosecution's evidence," such

as "analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," cannot properly be characterized as critical stages. *Wade*, 388 U.S. at 227. As the Court explained:

> [T]hey are not critical stages since there is minimal risk that [the accused's] counsel's absence might derogate from his right to a fair trial."

Id. at 228. Appellant has suggested no sound reason for the Court to question that conclusion in the context of mandatory alcohol concentration testing and analysis present here. Accordingly, this case presents no substantial federal question for the Court to consider.[2]

By the perversion of the test proposed by Appellant, the right to counsel would arise at times already specifically rejected by this Court; in *Wade*, the Court explicitly mentioned the taking of alcohol concentration tests, along with fingerprinting and other physical evidence-gathering procedures, as being so different from police interrogations as to "preclude such stages being characterized as critical stages at which the accused has the right to the presence of counsel." *Id.* at 227. However drastic the consequences of submitting for an alcohol test or fingerprinting, it cannot be contended

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[2] The Appellant errs in suggesting that the Minnesota Supreme Court failed to take into account "the only Federal Court pronouncement on this question." *Heles v. South Dakota*, 530 F.Supp. 646 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982), was cited to the courts below. The Minnesota Supreme Court presumably gave due consideration to *Heles* along with all other cases cited by both parties. Presumably the Minnesota Supreme Court agreed with the South Dakota Supreme Court, which held in *Department of Public Safety v. Gates*, 350 N.W.2d 59 (S.D. 1984), that having been vacated, the decision of the federal district court in *Heles* was a nullity with no precedential value whatsoever, even in the judicial district in which it was rendered.

that the police action, or the circumstances under which such evidence was gathered, will adversely affect the person's right to a fair trial.

Moreover, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court concluded that the collection of such evidence is a Fourth Amendment-search and seizure question and does not involve any Fifth Amendment problems which might require the giving of a *Miranda* warning involving the right to counsel. Implicitly, then, in *Schmerber*, and more recently in *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court has agreed that there is no constitutional right to counsel with respect to the decision as to whether or not to accede to the demand for submission to a mandatory alcohol concentration test.

Appellant's contention that implied consent statutes, after this Court's decision in *South Dakota v. Neville*, improperly place drivers in the position where they must decide what evidence will be offered against them at trial without the benefit of counsel is without merit. Appellant has not cited any authority whatever which suggests that any suspect in a criminal investigation has a constitutional right to determine what physical evidence can be used against him. Indeed, the Court's decision in *Schmerber* directly negates that suggestion. The Court upheld the admission of results of blood tests taken over the objection of the suspect based on counsel's advice and expressly rejected a claim that the right to counsel had been violated. In practical terms, the situation is really no different than that of a DWI suspect faced with the decision whether or not to stop in response to a red light, of a bank robber confronted by a police officer demanding that he surrender and give up his weapon and loot, or of a drug suspect ordered to surrender the package of cocaine in his hands.

In each such situation, the person faces a "critical" decision with far-reaching consequences. That decision, however, does not affect the person's right to a fair trial. It is clear that in none of those situations would the suspect be entitled to consult with counsel to decide whether he should accede to the police demand for surrender of the evidence. If there can be no right in such cases, where the evidence is of a type that can be secreted but does not self-destruct, no sound reason has been suggested why any such right should be granted where the evidence is as ephemeral in nature as a person's constantly changing alcohol concentration.

All fifty states have implied consent statutes. In the overwhelming majority of those states, the question of whether there is a federal constitutional right to the advice of counsel regarding the decision on whether to submit to testing has been answered in the negative. More than three dozen states have rendered decisions rejecting the position of the Appellant. Only Vermont has a decision from its highest court holding that a Sixth Amendment constitutional right to counsel exists regarding testing, and that decision appears to ignore the clear language of the decisions of this Court. Maryland rejects the Sixth Amendment rationale, but has found a "due process" right to counsel. Oregon rejects all of those theories, but has developed a unique "liberty interest" theory to find a 14th Amendment right. Thus, only four[3] states have found

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[3] Texas has an intermediate appellate decision that agrees with the Vermont decision. *Forte v. State*, 686 S.W.2d 744 (Tex.Ct.App. 1985). That decision, however, from the appellate court at Fort Worth, is contradicted by a more recent decision from the Court of Appeals at Houston, and is not final. *See McCambridge v. State*, No. 01-84-0507-CR (Tex.Ct.App. filed Aug. 29, 1985). Further review of the *Forte* decision by the Texas Court of Criminal Appeals was granted on October 23, 1985.

some pretesting right to counsel, whereas all other states that have considered the question have rejected any claim of a constitutional right to counsel prior to submitting to testing.

The suggestion that the decision of this Court in *Berkemer v. McCarty*, —— U.S. ——, 104 S.Ct. 3138 (1984) creates an impossible conflict is clearly without merit. In *Berkemer*, the Court held only that DWI suspects are entitled to a *Miranda* warning prior to any custodial interrogation. It did not suggest that all prior decisions holding that implied consent test demands are not "interrogations" are now invalid. Moreover, the facts in this case do not present the situation in which there may be confusion engendered by giving a *Miranda* warning followed by a test demand containing information that there is no right to counsel. In Minnesota, such potential problems have been avoided for many years by a procedure under which any custodial interrogation of a DWI suspect is delayed until after the testing process has been completed.

Finally, Appellant's argument that the officer's refusal to give her a second chance to submit to testing after she had once refused thwarts the will of the legislature obviously is not a federal or constitutional question. This contention also has not proved persuasive to the Minnesota Supreme Court, which has recognized that the Minnesota Legislature did not intend to obtain test samples no matter how much time the person delays compliance; rather, the Legislature manifested an intent to have samples provided promptly, with sanctions for noncompliance and a prohibition against administering tests when the person has refused.

CONCLUSION

Based upon the foregoing, Appellee respectfully submits that this appeal presents no substantial federal question and moves the Court to dismiss the appeal.

Respectfully submitted,

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